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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
MARTI POGUE

MARTI POGUE, In Proper Person respectfully petitions the Supreme Court of the United States to grant a Writ of Certiorari in the case of Marti Pogue v. Retail Credit Co., U.S. Court of Appeals Case No. 71-1270, wherein Marti Pogue was the Appellant and Retail Credit Co. was the Appellee. The opinion of the U.S. Court of Appeals for the Fourth Circuit is cited as *Pogue v. Retail Credit Co.*, 435 F.2d 336 (1972). Petitioner says she believes the lower court erred when it summarily affirmed the decision of the U.S. District Court for the Eastern District of Virginia and directs the Court's attention to the testimony and evidence of the Trial Court, Case No. 247-69A, and the decision of that Court handed down by Oren R. Lewis, District Judge.

The jurisdiction of the United States Supreme Court is invoked by virtue of the fact that Petitioner earnestly believes that both the Trial Court and the Appeals Court, in rendering their respective decisions violated her right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America. See *Baltimore & Carolina Line, Inc. v. Redman*, N.Y. (1935), 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636; also *Allen v. Briggs*, D.C. Pa. (1945) 62 F.Supp. 229.

The judgment sought to be reviewed in the U.S. District Court, Case No. 247-69A, was handed down on November 5, 1972 and entered on November 13, 1972. The judgment sought to be reviewed in the U.S. Court of Appeals, Case No. 71-1270 was rendered on January 19, 1972.[1]

---

[1]Petitioner contends that there were two separate sets of errors; one on the part of the Trial Court, the other on the part of the Appeals Court.

On February 11, 1972 the U.S. Court of Appeals ordered, at Petitioner's request, which she filed in Proper Person, that the time for filing a Petition for Rehearing be extended to and including February 25, 1972. Accordingly, on February 22, 1972 she mailed to the Office of the Clerk of the U.S. Court of Appeals her Petition for Rehearing and on March 6, 1972 that Court denied her Petition for Rehearing.

Petitioner respectfully submits that on September 27, 1972 she received a telephone call from the Clerk of the United States Supreme Court granting an extension of time for filing a Petition for Certiorari and calls the Court's attention to a letter to her (App. 1) dated September 30, 1972 from the Office of the Clerk of the United States Supreme Court.

The United States Supreme Court's jurisdiction to review the judgments handed down by the U.S. District Court and the U.S. Court of Appeals is conferred by the statutory provision governing diversity of citizenship and amounts in controversy in excess of $10,000.00.

The questions presented for review are as follows:

I. DID NOT THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ACTION AGAINST THE PLAINTIFF (HERE THE PETITIONER) IN FAVOR OF THE DEFENDANT RETAIL CREDIT CO. WHEN THE PLAINTIFF'S COMPLAINT WAS BASED UPON THE THEORY THAT A CREDIT REPORTING COMPANY IS LIABLE TO ONE WHO ACCEPTS AND RELIES ON A CREDIT REPORT EVEN THOUGH THERE WAS NO "PRIVITY OF CONTRACT" BETWEEN THE PLAINTIFF, USER OF THE REPORT, AND THE COMPANY SUPPLYING SAID REPORT IF IN FACT THE CREDIT REPORT WAS EITHER NEGLIGENTLY OR WITH "GROSS NEGLIGENCE" PREPARED FOR RELEASE?

II. DID NOT THE COURT OF APPEALS COMMIT A SECOND ERROR, SEPARATE AND INDEPENDENT OF THE FIRST, WHEN THAT COURT IN ITS OPINION CONCEDED THAT THE PLAINTIFF HAD PROBABLY PROVED HER CASE BUT HAD FAILED TO PROVE RELIANCE BECAUSE "DESPITE MISS POGUE'S TESTIMONY, AN OBJECTIVE EVALUATION OF THE REPORTS PUBLISHED BY RETAIL CREDIT INDICATES THAT THEY CONTAIN NO INFORMATION ON WHICH AN EXPERIENCED BUSINESSWOMAN MIGHT REASONABLY RELY"?

STATEMENT OF FACTS

The Appellant, Pogue, a resident of the State of Florida brought suit against Retail Credit Co., a corporation incorporated under the laws of the State of Georgia and doing business in the State of Virginia, for damages incurred as a result of her reliance upon a financial and character report compiled and published by Retail Credit Co., a mercantile organization in the business of providing such reports, obtained for her by Hammerly as well as her reliance upon misrepresentations made by Hammerly. Her complaint against Retail Credit Co. alleged breach of contract and constructive fraud. (R. Vol. 1-2) (All emphasis herein supplied by author unless otherwise noted.)

The basis of Petitioner's complaints revolves around a financial and character report prepared by Retail Credit Co. on Walker & Townsend, Inc., a New York corporation (hereinafter "Walker & Townsend"). Petitioner read an advertisement in a Miami newspaper to the effect that Walker & Townsend were engaged in the business of loaning up to ninety per cent of the value of stock placed with it for collateral. (Tr. 59). She traveled from Miami to New York City and entered into negotiations with Walker & Townsend. On or about July 20, 1967 she borrowed $33,000.00 from Walker & Townsend, signed two notes for $18,000.00 and $15,000.00 and signed a power of attorney and letter of instruction to Walston & Co., her Miami broker and Peoples Bank authorizing transfer to Walker & Townsend of the stock they held for her (Tr. 56-58).

Petitioner was not entirely satisfied with her knowledge of Walker & Townsend, however, and on the day

following her first transaction with them, she telephoned Mr. Hammerly in Leesburg, Virginia. Hammerly was in the insurance investment business. (Tr. 30). Petitioner testified that prior to her negotiations with Walker & Townsend, Hammerly told her that he could get a "Dun & Bradstreet report" for her on any company she desired. (Tr. 29). Recalling this and confident that she could cancel the loan with Walker & Townsend by repaying the loan and instructing the transfer agents not to transfer the stock she requested Hammerly to provide a financial and character report by Dun & Bradstreet on Walker & Townsend. (Tr. 30). Subsequently, she received a letter, dated August 1, 1967, from Hammerly which stated:

"Dear Marti:

I have ordered the other credit reports and I attach a photostat of a letter on Walker and Townsend. I have asked Retail Credit to make a *complete report.* As soon as I get them, you will hear from me." (Emphasis supplied.) (App. p. 12).

The letter from Retail Credit, which was attached was dated July 25, 1967, and addressed to Hammerly, stated that a search of Retail Credit's records revealed no information on Walker & Townsend. The letter closed by stating that an "up-to-date investigation" could be provided. (App. p. 13) (Tr. 33)

Petitioner testified that she called Hammerly upon receipt of the letter and photostat copy and asked him why he had not provided a Dun & Bradstreet report as requested. (Tr. 32). Hammerly replied that Retail Credit had a commercial department and its reports "were every

bit as good as Dun & Bradstreet reports." (Tr. 34). On the basis of this representation, she stated she would accept his word as he had superior knowledge and allowed him to pursue the requested information from Retail Credit. (Tr. 34). Thereinafter, she received a letter from Hammerly, dated August 14, 1967, with a Retail Credit report on Walker & Townsend. (Ap. Br. A. 15a-16a) (Tr. 35) The cover letter from Hammerly stated:

"Dear Marti:

Attached please find a Retail Credit report on Walker and Townsend. You are not supposed to have this with my account number on it; hence, you will note that I have cut it off.

In any event, it is not very informative, but it is the best I know how to do. *It does not look like they are fronting for any crooked outfit, so it looks like you are in good shape.* In any event, I hope so." (Emphasis supplied.) (App. p. 14).

The attached report stated:

". . . Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. They have been here for the past six years. This firm is a European finance company specializing in collateral loans. They are not a fund for any union. Principles (sic) of this firm cannot be identified as the firm does not reveal this information. The principles (sic) have their identity hidden. Two people will run the firm as

representatives in New York City, a Mr. Harrison and a Mr. Lundy. These people, we were told are constantly on the road traveling and very rarely in their office. This firm also has a bookkeeping department located somewhere in Philadelphia. We noted the door of the office had a cable address written Bienvenido, New York.

A source contacted at this business address stated in his opinion this is a multi-million dollar outfit. Please note this could not be confirmed." (Tr. 36-7) (App. p. 15).

Relying upon the report and upon Hammerly's assurances, she did nothing to cancel her arrangement with Walker & Townsend and later negotiated another loan with the company for $18,000.00. At the same time, the second note, signed on July 20, 1967, for $15,000 was re-executed and the old one destroyed. (Tr. 225-26). Again she pledged stock as collateral for the loan in the same manner described previously. As a result of the three loans, she transferred approximately $67,000 worth of securities to Walker & Townsend. (Tr. 52-3) (Ap. Br. A. 24-27a) Subsequent to the third loan she became suspicious of Walker & Townsend because of their failure to forward dividend checks to her. She then initiated further investigation of the company through her Miami bank. (Tr. 39-40). The bank ordered a Dun & Bradstreet report on the company. When that report was provided to her, some time in October of 1967, she became fearful of the safety of her securities. (Tr. 42-44) (Ap. Br. A. 18-22a). She called Hammerly and informed him that it appeared that Walker & Townsend were "worthless" as the report clearly showed "they were a bunch of crooks and they were under Federal

indictment . . . and had other previous arrests and convictions and that the report he had given me wasn't worth anything." (Tr. 45). Hammerly then refused to lend her money to aid her in trying to get her stocks back. (Tr. 48).

She then went to New York with an attorney to try to save her stock. She found the Walker & Townsend offices abandoned, their phone disconnected and their officers unavailable. (Tr. 50-51). She, some months later, was able to make arrangements through a New York bank to pay off her loan for the return of the stock but her efforts were too late—Walker & Townsend had absconded with the securities. (Tr. 106).

ARGUMENT

I. DID NOT THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ACTION OF DIRECTING A VERDICT AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT, RETAIL CREDIT CO. WHEN THE PLAINTIFF'S COMPLAINT WAS BASED UPON THE THEORY THAT A CREDIT REPORTING COMPANY IS LIABLE TO ONE WHO ACCEPTS AND RELIES ON A CREDIT REPORT EVEN THOUGH THERE WAS NO "PRIVITY OF CONTRACT" BETWEEN THE PLAINTIFF, USER OF THE REPORT, AND THE COMPANY SUPPLYING SAID REPORT IF IN FACT THE CREDIT REPORT WAS EITHER NEGLIGENTLY OR WITH "GROSS NEGLIGENCE" PREPARED FOR RELEASE?

In replying to this question which the Appellant raised in her appeal before the U.S. Court of Appeals, that Court in its published Opinion said, "The test on directing a verdict, however, is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice (2d Ed. 1971) §50.02 (1); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80; *Pinehurst, Inc. v. Schlamowitz*, 4 Cir., 351 F.2d 509, 513."

"Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report." Obviously, this statement is not a conclusive answer and with the Court's indulgence Plaintiff wishes to reiterate for this Court her argument on the theory of Retail Credit's liability as presented in her appeal brief.[2]

In testing the soundness of the Trial Court's decision to grant the defendant Retail Credit's motion for a directed verdict this Court must view the evidence in the light most favorable to the plaintiff, Pogue. *Richmond Television Corp. v. United States*, 354 F.2d 410 (4th Cir. 1965). Taking these favorable facts, without making a decision concerning credibility, the Court must then determine whether or not the evidence, viewed in this light, makes out a prima facie case for liability against the defendant under any theory of recovery. See *Pinehurst v. Schlamovitz*, 351 F.2d 509 (4th Cir. 1965).

[2]"Claims of error neither argued nor submitted may be assumed abandoned." *Erie R. Co. v. Collins*, 40 S.Ct. 450, 253 U.S. 77, 64 L.Ed. 790.

The evidence showed that Retail Credit was a mercantile credit reporting agency with offices in several cities that engaged in the business of investigating and reporting upon the reputation and credit standing of individuals and corporations. (Tr. 34, 172-78). Testimony also showed that Retail Credit accepted a fee for rendering a financial and character report concerning Walker & Townsend from Hammerly who was acting in her behalf. (Tr. 148, 151.) The Trial Court further found that it was well known in the credit reporting trade that such reports were often obtained by subscribers, such as Hammerly, for third parties. (Tr. 146, 188). Moreover, Hammerly admitted that he had previously engaged in this practice with Retail Credit reports. (Tr. 145).

Plaintiff's clear reason for obtaining the report was to decide whether to let her first transaction with Walker & Townsend stand or to attempt to cancel it. (Tr. 29-30). In addition she desired the information to aid her in deciding whether to enter into any subsequent transactions with Walker & Townsend. Upon obtaining the report she was not informed of any reason why she should not do business with Walker & Townsend. Accordingly, she elected to forego any attempt to rescind the July 20, 1967 assignment of securities and instead, renegotiated the second of the two loans and entered into a third loan agreement with Walker & Townsend. The report basically speaks for itself, with the qualification that the first letter from Retail Credit to Hammerly stated that "an up-to-date investigation" could be made of Walker & Townsend. (Ap. Br. A. 14a) (Tr. 32). It is apparent that she and Hammerly relied upon this representation before ordering the investigation. (Tr. 33-34).

Nevertheless, the Trial Court directed a verdict in favor of Retail Credit Co. at the conclusion of the evidence because [it stated] there was no "credible evidence on any theory . . .". (Tr. 209).

It is respectfully submitted that the Trial Court failed to consider *both* theories offered by the plaintiff against Retail Credit. The arguments below indicate that the Court was concerned with the absence of any "privity of contract" between the parties (Pogue and Retail Credit) and that this factor weighed in the Court's decision. (Tr. 205-09). In addition, by its own admission the Court made some findings of credibility in making its decision. (Tr. 209). It should be recalled that neither the pleadings nor the evidence relied exclusively upon a contractual theory against Retail Credit.

The Court did not appear to consider the theory of negligent misrepresentation applicable to plaintiff's case. However, it is submitted that recovery could be granted under this theory. This theory is one based upon duty and it permits recovery where the injured party did not deal directly with the person who made the misrepresentation. As Justice Cardozo stated:

> "One who follows a common calling may come under a duty to another whom he serves, *though a third may give the order or make the payment*". *Glanzer v. Shepard*, 233, N.Y. 236, 239, 135 N.E. 275, 276 (1922). (Emphasis supplied).

In *Glanzer*, *supra*, the plaintiff purchased a large quantity of beans from a third party. The seller contracted with the defendant, a public weigher, to weigh the beans

and make certificate of the weight to it and the buyer. The weigher was negligent and the buyer sued for the amount of his overpayment based upon the overweight. Recovery was allowed even though there was no contract or agreement between the plaintiff and the weigher.

In finding liability Justice Cardozo held that the significant factor upon which recovery was based for negligent misrepresentation was the likelihood that the defendant realized that a third party would rely upon his representations:

> "The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor." Id. at 240, 135 N.E. at 276.

Justice Cardozo was careful to point out that:

> "Here the defendants are held, not merely for careless words . . . but for careless performance of a service—the act of weighing—which happens to have found in the words of a certificate its culmination and its summary." Id. at 241, 135 N.E. at 276.

In a case of personal injury, not pecuniary loss, the Virginia courts have taken notice of the fact present here, that the negligent misrepresentation was made by a person who was in the business of having unique knowledge concerning the field about which he spoke. See *Valz v. Goodykoontz*, 112 Va. 853, 72 S.E. 730 (1911).

In considering whether the lack of "privity of contract" will bar recovery for negligent misrepresentation for pecuniary loss in any case the courts have erected vague and artificial barriers to protect certain classes of defendants and to curtail recovery. See W. Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 230 (1966). Unlike the steady rejection of the requirements of privity in cases of personal injury[3] the evolution of the law in the area of pecuniary loss for misrepresentation based upon negligence has been uneven and slow.

The leading case often cited for limiting liability is Justice Cardozo's opinion in *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). There the Court denied liability for negligent misrepresentation by a public accountant who was hired by a corporation to prepare a balance sheet with the knowledge that certain unspecified investors would possibly rely upon the balance sheet in determining whether to invest. The plaintiff lost several hundred thousand dollars by relying on a negligently prepared balance sheet. The Court held that the accountant, although not hired by the plaintiff, owed him and others of his class a certain legally definable duty. Id. at 444, 174 N.E. at 441. However, because of the indefinite size of the possible class of plaintiffs in such cases, Justice Cardozo held that unless the plaintiff's interest was "foreseen" by the defendant there was a duty only to refrain from "gross negligence" insofar as third parties were concerned. The logic and the wisdom of this decision has been assailed

[3]For the development of the law in Virginia see *Hempstead v. General Fire Extinguisher Corp.*, 269 F.Supp. 109 (D.Del. 1967) and *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir.), cert. denied, 342 U.S. 887 (1951).

consistently.[4] and recently at least one federal court has effectively overruled *Ultramares, supra*, by broadening the definition of who is "foreseen" and making this a *jury* question. *Rusch Factors, Inc. v. Levin*, 284 F.Supp. 85 (D.R.I. 1968).

As *Rusch Factors, supra*, properly points out the *Ultramares* rule is an "unwarranted inroad upon the principle that, the risk reasonably to be perceived defines the duty to be obeyed . . ." Id. at 91. Moreover, the *Rusch Factors* Court points out that the Restatement of Torts[5] has taken a view that to be liable the negligent party need not know the identity of the third party who relies, but only the existence of such a class. The Court also referred with approval, to the dissenting opinion in the *New York Title & Mortgage Co. v. Hutton*, 71 F.2d 989 (D.C. Cir. 1934) which reasoned there would seem to be no logical distinction between physical injury and damage to purely economic interests:

> "Nor is there any sound reason for denying liability for the use of negligent words. . . . It has been said that the reckless writer should be held to as high a standard as the reckless driver, "for his pen may impoverish thousands while his car can hurt but a few." Id. at 996

It is respectfully submitted that there seems no question that Retail Credit should have known that its report might

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[4]See, e.g., Goodhart, 74 Yale L.J. 286 (1964); 57 Calif. L. Rev. 281 (1969); 52 Marq. L. Rev. 159 (1968); 53 Minn. L. Rev. (1969); Levitin, 15 Hastings L.J. 436 (1964); Meek, 1964 Wis. L. Rev. 371, 388; Rouse, 23 Ky. L.J. 3 (1934); Note, 36 Iowa L. Rev. 319, 327-28 (1951).

[5]Restatement of Torts 2d 552 (tentative draft No. 10).

be used for investment purposes and that it therefore had a duty to use ordinary care in preparing the report. Whether it was to be used by Hammerly, by Hammerly and someone acting in concert with him or by someone with whom Hammerly had a special relationship does not seem important in light of the fact that Retail Credit was paid for its services and held itself out as a mercantile agency specializing in such a line of endeavor. The Trial Court properly took judicial notice (Tr. 146, 188)[6] that the situation presented in this case is one which commonly occurs in business. It is submitted that even though there was no privity of contract between Pogue and Retail Credit there was a special relationship created by Pogue's relationship with Hammerly and Retail Credit's imputed knowledge that these reports were often used by non-subscribers. See *Davis v. Louisville Trust Co.*, 181 Fed. 10 (6th Cir. 1910) (non-subscriber recovered against person furnishing credit reporting agency incorrect information).

Application of the rule of *Glanzer v. Shephard*, 233 N.Y. 236, 135 N.E. 275 (1922), previously discussed, to the theory of recovery in this case would not only be in accord with the modern trend but would also be consistent with an earlier opinion involving an analogous situation. *United States v. Nuestadt*, 281 F.2d 596 (4th Cir.), *rev'd on other grounds*, 366 U.S. 696 (1961). There an appraiser, negligently investigated the structural soundness of a house. The appraiser was employed by the Federal Housing Administration and reported his findings to it for the purpose of determining how much of a loan guarantee should be fixed by that agency. The buyer was given access to the

[6]Tr. 146, 188. As the Court stated in *Davis v. Louisville Trust Co.*, 181 Fed. 10, 16 (6th Cir. 1910) ". . . courts are accustomed to take judicial notice of the methods of mercantile agencies . . ."

appraisal as a matter of course. The Court held that the buyer's reliance upon the appraisal was actionable under the Federal Tort Claims Act for negligent misrepresentation. The Supreme Court reversed on the grounds that the Tort Claims Act specifically rejected recovery for deceit and negligent misrepresentation. However, the point that, at common law, a cause of action would arise from reliance without privity was not overturned.

It should also be noted that even a strict adherence to the *Ultramares* rule would not justify the action by the Trial Court. For *Ultramares* held that the jury was properly instructed upon the possibility of returning a verdict for the plaintiff based upon constructive fraud. Justice Cardozo wrote:

> "Negligence or blindness, even when not equivalent to fraud is nonetheless evidence to sustain an inference of fraud. At least this is so if the negligence is gross." 235 N.Y., 170, 174 N.E. at 449.

Under this approach "scienter" need not be proved and the case may be submitted to the jury for determination of whether the defendant was guilty of "gross negligence". It is submitted that there was sufficient fact for the jury to be permitted to make a determination of Retail Credit's culpability. As the Court stated in *B & W Acceptance Corp. v. Benjamin T. Crump,*[7] *Inc.*, 199 Va. 312, 99 S.E. 2d 606 (1958):

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[7]Accord *Union Trust Co. v. Fugate*, 172 Va. 82, 200 S.E. 624 (1939); *Chandler v. Russell*, 164 Va. 318, 180 S.E. 313 (1935); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933); *Trust Co. v. Fletcher*, 152 Va. 868, 148 S.E. 785 (1929); *Moore v. Gregory*, 146 Va. 504, 131 S.E. 692 (1926); *Schmely Bros. v. Quinn*, 134 Va. 78, 113 S.E. 845 (1922); *Lowe v. Trundle*, 78 Va. 65 (1883).

> "It has been held for a long time in Virginia that when one represents as true that which is not true, and another relies thereon to his damage, the latter may recover for false representation whether it was knowingly or innocently made." Id. at 99 S.E. 2d at 609.[8]

Whether or not a verdict should have been rendered in Petitioner's favor is not the question. The question is whether or not she brought forward enough evidence to have a jury determination of her theory of the case. To hold that there was no evidence to show that Retail Credit failed to use ordinary care (under the theory of *Glanzer v. Shephard, supra*) or was guilty of "gross negligence" (under the restrictive view of *Ultramares, supra*) seems to ignore the whole import of the evidence and testimony presented in the Trial Court.[9] namely:

I. The lack of any meaningful review of the Retail Credit report by a supervisor. Although Heins Arens testified that he "supervised" the report he had no recollection of any participation in its preparation or review. (Tr. 179).

II. The financial and character report which Retail Credit Co. prepared, published and released must be evaluated for what it does not state as for what it does assert. Nowhere is there any indication that the report is not a

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[8]The law of Virginia is applicable under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See generally C. Wright, Federal Courts 187-215 (1963).

[9]It should be noted that in testing the correctness of a directed verdict the Court may consider the evidence adduced by either party. *Newman v. Brengle*, 250 F.2d 660 (7th Cir. 1957), cert. denied, 356 U.S. 951 (1958).

complete report or that it was not based upon a full investigation of the available data concerning Walker & Townsend. (Ap. Br. A. 16a).

III. The complete absence of any detriment information whatsoever on the Retail Credit report despite the fact that the employees of Walker & Townsend were under indictment on criminal charges at the time the investigation was made. It also should be remembered that in privately held enterprises often times the activities of a firm become a part of the public records when they do *not* discharge their affairs in a businesslike, forthright manner, and do not become a part of the public record when they do.

IV. The Retail Credit report itself dated August 11, 1967, which states:

> "... Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm *occupies several offices* on the fourth floor of this building. *They have been here for the past six years.*" "... A source contacted at this business address stated in his opinion *this is a multi-million dollar outfit* ..." (Ap. Br. A. 16a).

Petitioner respectfully maintains that the evidence and testimony in the Trial Court below shows that there was not only sufficient evidence, but ample evidence of negligence on the part of Retail Credit and that her case should have been submitted to a jury for determination. In *Brady v. Southern Railroad*, 320 U.S. 476, 479-80 (1943) the Supreme Court held that directed verdicts would be granted *only*:

"When the evidence is such that without weighing the credibility of the witnesses there can be but *one* reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . ." Id. (Emphasis supplied).

II. DID NOT THE COURT OF APPEALS COMMIT A SECOND ERROR, SEPARATE AND INDEPENDENT OF THE FIRST, WHEN THAT COURT IN ITS OPINION CONCEDED THAT THE PLAINTIFF HAD PROBABLY PROVED HER CASE BUT HAD FAILED TO PROVE RELIANCE BECAUSE "DESPITE MISS POGUE'S TESTIMONY, AN OBJECTIVE EVALUATION OF THE REPORTS PUBLISHED BY RETAIL CREDIT INDICATES THAT THEY CONTAIN NO INFORMATION ON WHICH AN EXPERIENCED BUSINESSWOMAN MIGHT REASONABLY RELY"?

Petitioner respectfully submits that the United States Court of Appeals erred in its decision by ruling on a question that should have been submitted to a jury for determination and that the Court in substituting its opinion for that of a jury, denied Petitioner her right to a jury trial. See *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80. As the court held in *Jacob v. N.Y.*, (1943) 315 U.S. 752, 62 S.Ct. 854:

"The right of jury trial in civil cases at common law, whether guaranteed by Constitution or provided by statute should be jealously guarded by the courts."

What the Appeals Court did, in substance, was state that although the Trial Court might have given the wrong reason for directing a verdict against Petitioner and in favor of the defendant, Retail Credit, it was nonetheless correct in doing so because the Court of Appeals decided on its own that Petitioner was not entitled to rely on the credit report. That Court in its published Opinion stated:

> "Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am. Jur. 2d *Fraud and Deceit* §223 (1968). Petitioner testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even though she had committed herself. Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contain no information on which an experienced businesswoman might reasonably rely . . ."

Petitioner respectfully submits that there was no issue raised on this point during the trial. Petitioner's testimony was uncontroverted and rather than have the Appeals Court decide on either the credibility of her testimony or whether or not she was reasonable in relying on the credit reports and advice given her by Mr. Hammerly the matter

should have been submitted to a jury for consideration. By substituting its own judgment for that of a jury both the Appeals Court and the Trial Court below, violated Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America. In *Baylis v. Travelers Insurance Co.*, N.Y. (1885), 5 S.Ct. 494, 113 U.S. 320, 28 L.Ed. 989, the court held:

> "Without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon."

The evidence in the Trial Court conclusively demonstrates that there was sufficient evidence to show that the credit reports prepared, published and released for use by Retail Credit Co. did contain information on which an experienced businesswoman or businessman might reasonably rely, and directs the Court's attention once again to the credit report prepared by Retail Credit dated August 11, 1967, which states:

> "... Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. *They have been here for the past six years...*"

This material fact assures the reader that Walker & Townsend has been in business in one location alone for the past six years and therefore has been in business *at*

least six years when in fact Walker & Townsend was not incorporated until August, 1965. (See Dun and Bradstreet Report dated July 19th, 1972). App. 16).

The same report continues:

". . . A source contacted at this business address stated in his opinion *this is a multi-million dollar outfit* . . ."

This statement tells the reader that some source, other than Walker & Townsend, at the multi-story building located at 80 Wall Street thought Walker & Townsend to be a multi-million dollar outfit.

It is respectfully submitted that the report is to be *relied* on as much for what it does *not* state as for what it does assert. Nowhere is there any indication that the report is not a complete report or that it is not based upon a full investigation of the available data concerning Walker and Townsend and directs the Court's attention to *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 704, 15 N.E. 2d 416, 16 N.E. 2d 851 (1938), a case involving a firm of public accountants in a situation not unlike that of Retail Credit. Here the Court held:

"Public accountants may be held liable for loss on a loan made in reliance on a balance sheet prepared by them without adequate investigation and put into circulation unaccompanied by a statement showing the limited scope of their audit, although in making the loan there was reliance on the business reputation of the borrower."

This Court also held on the subject of reliance on representations:[10]

> "Fraudulent misrepresentations to be actionable, need not be a sole inducing cause of plaintiff's loss, but *it is sufficient if they were an inducing cause.*" [See R.C.L. title "Fraud and Deceit" § 112].

Petitioner testified (Tr. 85-86) that she considered the report to be favorable by virtue of the fact that Walker & Townsend had been in business for at least six years, was considered to be a multi-million dollar outfit *and* that nothing of a detrimental nature whatsoever had been developed on the firm during its six years of operation. She further testified that she relied on this report (Tr. 228) as did her agent George Hammerly.

George Hammerly was an experienced businessman. He brokered airplane money (Tr. 157); invested in second trusts (Tr. 162); and ventured into the stock market from time to time. (Tr. 168). He also had operated a substantial insurance agency for twenty-five years. (Tr. 144). Mr. Hammerly had been a user of Retail Credit Co.'s services for approximately five years. (Ap. Br. A. 31a) and he knew why plaintiff desired information about Walker & Townsend. In a letter to the plaintiff dated August 14, 1967 (Ap. Br. A. 15a) which accompanied the Retail Credit Co. report he transmitted to her George Hammerly stated:

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[10]See also *Ochs v. Woods*, 221 N.Y. 335, 117 N.E. 305; *Laska v. Harris*, 215 N.Y. 554, 109 N.E. 599.

". . . it is the best I know how to do. It does not look like they are fronting for any crooked outfit so it looks like you are in good shape . . ."

Petitioner, however respectfully submits that it was *not necessary* for her to use even reasonable diligence in relying on the information furnished by Retail Credit Co. by virtue of the "confidential relationship" that existed between Retail Credit and her agent, George Hammerly, and that as the undisclosed principal in this transaction she was entitled to enjoy the same degree of reliance on the reports as was her agent. Whether or not Retail Credit knew she was the undisclosed principal is immaterial by virtue of Retail Credit's imputed knowledge that these reports were often ordered by subscribers for the use of non-subscribers. (Tr. 146, 188).

Petitioner directs the Court's attention to the pleadings filed in this case. (App. p. 24).

"COUNT I

(Breach of Contract)

1. On or about July 25, 1967, Plaintiff's agent, George Hammerly, contracted with defendant Retail Credit Co., that he would purchase and they would sell, one character and financial report on Walker and Townsend Co., of 80 Wall St., New York, N.Y., based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and the consideration there-

fore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation."

37 C.J.S. *Fraud and Deceit*, page 282 (1943) §35 says on the subject of confidential relationships:

"A party may rely on another's representations without respect to their nature as expressions of opinion and without investigating their truth when the relation between the parties is confidential, but reliance may be justified even in the absence of such a relation. *A confidential relationship exists wherever trust and confidence are reposed in another under circumstances as to impose on the person trusted the obligation to act in good faith.*"

Restatement, Trusts Section 2 (b), cited in *Popejoy v. Easturn*, 241 Iowa 747, 757, 41 N.W. 2d 764, 769 (1950) says:

"A confidential relationship exists between two persons when one has gained the confidence of the other and purports *to act or advise the others interest in mind.*"

By definition, the relationship which George Hammerly and his undisclosed principal, Miss Pogue enjoyed

with Retail Credit must be described as a confidential one. Retail Credit was a mercantile credit reporting organization in the business of reporting upon the reputation and credit standing of individuals and corporations for which it received a fee. George Hammerly had been a subscriber of Retail Credit Co.'s services for five years and during that time he repeatedly accepted and relied on the reports Retail Credit furnished him, thereby imposing on Retail Credit the obligation to act in good faith in performing the duty entrusted to them.

Petitioner respectfully submits for the Court's consideration, *Butcher v. Newburger*, 179 A. 240, 241, 318 Pa. 547 (1935), a case somewhat similar to the one at hand. In this situation Butcher gave the manager of Newburger, Henderson & Loeb, a stock brokerage firm an order to purchase 100 shares of Utilities Power & Light Corp. "A" stock for which he was given a receipt for $500.00. At the same time defendant's manager handed him 100 shares of Utilities Power & Light common (non-voting) telling the plaintiff that it was "A" stock. When plaintiff discovered the error he brought suit against Newburger. Defendant countered that plaintiff had a duty to examine the stock certificate and the stock certificate quite clearly said "100 shares Utilities Power & Light common." The Court said "No", and held in favor of the plaintiff, saying:

> *"Where parties deal on basis of trust and confidence, party making representation is bound hereby."*

Another case analogous to the one being reviewed is *Smith v. N. Y. Life Ins. Co.* (1962) 208 F.Supp. 240-244. In this situation the plaintiff, Smith purchased an annuity

contract from defendant for $15,000 based on the defendant's agent's representations that in case of an emergency he could have the policy commuted. One year later what Smith considered to be an emergency arose and he demanded by letter to the defendant the commuted value of the contract. Defendant refused, alleging that the terms of the contract did not provide for payment of the commuted value. Smith brought suit. The District Court ruled in behalf of the plaintiff and was sustained on appeal. The Appeals Court held:

> "Superior knowledge of insurance possessed by the insurer's agent, as well as element of confidential relationship between the parties brought such relationship close to a fiduciary relationship, at least close enough that insured, for purposes of determining whether he had established a right to recover for deceit, was reasonable in relying on statements of agent that annuity policy to be issued could be cashed in an emergency."

Petitioner respectfully maintains that Retail Credit Co.'s relationship with her and her agent, George Hammerly parallels the relationship of Smith with N. Y. Life Ins. Co. Retail Credit Co. possessed superior knowledge in the field of credit investigating and reporting and knew what information a properly prepared and completed credit report should contain. This superior knowledge coupled with the element of confidential relationship which existed between Hammerly and Retail Credit Co. entitled him to rely, without question, on the reports which Retail Credit Co. furnished him on Walker & Townsend. Petitioner was aware of the relationship between Retail Credit and George Hammerly when she agreed to accept the reports from Hammerly and by virtue of her agency relationship with

Hammerly, she, as the undisclosed principal, was also entitled to rely on these reports. As set forth in Restatement, Agency (1933) §315:

> "A person who fraudulently obtains a contract through, or enters into a transaction with, an agent acting within the scope of his power to bind the principal, *or* who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, *is subject to liability to the principal* whether the fraud is practiced on the agent or upon the principal." The rule stated in this section was made applicable whether the principal is disclosed, partially disclosed or *undisclosed.*[11]

This fact, coupled with the element of a confidential relationship,[12] *conclusively* proves Petitioner's right, to blindly and without question, rely upon the credit report prepared, published and released for use by Retail Credit Co.

Petitioner, MARTI POGUE, In Proper Person respectfully submits to the Supreme Court of the United States that the U. S. Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings *and* so far has sanctioned such a departure by a lower court, the District Trial Court, as to call for an exercise of this Court's power of supervision. In support of this statement Petitioner offers the following:

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[11]Cited Texas L. Rev., Vol. 17, No. 1 (1938).

[12]"If confidential relations obtain *nothing short of actual knowledge will prevent recovery for misrepresentation.*", *Butcher v. Newburger*, 179 A. 240, 241, 318 Pa. 547 (1935).

1. The Appeals Court failed to answer conclusively the issue raised on appeal; namely, did not Petitioner prove her case against Retail Credit regarding either negligence or "gross negligence" sufficiently to have the question submitted by the Trial Court to a jury for determination?

2. The Appeals Court in ruling that she had failed to prove her case on the question of reliance ruled on a question not on issue and either overlooked or failed to apprehend the fact that Petitioner relied on a *material* misrepresentation of fact; namely, that " . . . They [Walker & Townsend] have been here for the past six years . . . "

3. The Appeals Court failed to appreciate the significance of the "confidential relationship" she entertained with Retail Credit by virtue of her agency relationship with George Hammerly, whereby she was the undisclosed principal in the transaction with Retail Credit.

4. The Appeals Court in determining that the reports " . . . contain no information on which an experienced business-woman might reasonably rely . . .," substituted itself for the jury, thereby violating Petitioner's right to a jury trial as guaranteed by the provisions of the Seventh Amendment to the Constitution of the United States of America.

CONCLUSION

On the basis of the foregoing arguments Petitioner respectfully requests that the United States Supreme Court grant a Writ of Certiorari in favor of Marti Pogue and remand the case to the U. S. District Court with instructions to instruct the jury on the appropriate theories of relief.

Dated this 30th day of October, 1972.

Respectfully submitted,



MARTI POGUE
In Proper Person
1240 N. E. 117th Terrace
Miami, Florida 33161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to the following addressee this 30th day of October, 1972.

Adelard Brault; Brault, Lewis & Geschickter
P.O. Box 248, Fairfax, Virginia 22030

Counsel for Retail Credit Co.

Marti Pogue

MARTI POGUE
1240 N.E. 117th Terrace
Miami, Florida 33161

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON D. C. 20543

September 30, 1972

Mr. Marti Pogue
1240 N. E. 117th Terrace
Miami, Fla. 33161

Dear Sir:

As you were advised by telephone on September 27, 1972, this office will file your petition for a writ of certiorari although the time for filing may have expired.

I, therefore, return your motion together with the lower court decision received from the office of the Clerk of the United States Court of Appeals for the Fourth Circuit.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ Edward C. Schade
E. C. SCHADE
Assistant

law
Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION
NO. 247-69-A

MARTI POGUE,
Plaintiff,

vs.

RETAIL CREDIT CO.,
Defendant.

CIVIL ACTION
NO. 278-69-A

MARTI POGUE,
Plaintiff,

vs.

GEORGE HAMMERLY,
t/a Garrett Insurance Agency,
a/k/a George P. Hammerly
Associates,
Defendant.

ORDER

The 5th day of November, 1970, came the plaintiff, in person and by counsel, the defendant, George Hammerly, in person and by counsel, and the defendant, Retail Credit Company, by counsel, and this case came on for trial upon the plaintiff's Complaint and the Answers of the defendants. Thereupon came a jury of eighteen veniremen, who

were sworn and examined on their voir dire and found to be competent and qualified jurors, and from the panel of veniremen, twelve persons were duly selected, with counsel for plaintiff and counsel for defendants each having exercised three peremptory strikes. Thereupon, the said jury heard the opening statements of counsel and heard all of the evidence in the case. At the close of the plaintiff's evidence, both defendants, by their counsel, moved for directed verdicts, which said motions were denied by the Court. After the said jury heard all of the evidence in the case, the defendant, Retail Credit Company, by its counsel, renewed his motion for a directed verdict. After hearing argument of counsel, the Court found as a matter of law that the plaintiff had not proved a contract existed between her and the defendant, Retail Credit Company.

IN CONSIDERATION WHEREOF, it is by the Court ORDERED and ADJUDGED that the plaintiff, Marti Pogue, recover nothing from the defendant, Retail Credit Company.

AND THIS ORDER IS FINAL.

Entered this 13th day
of November, 1970.

OREN R. LEWIS

United States District Judge

(Seal)

A True Copy, Teste:

W. FARLEY POWERS, JR., Clerk

By JOHN EDWARD COX
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1270

Marti Pogue,

Appellant,

versus

Retail Credit Company,

Appellee.

No. 71-1271

Marti Pogue,

Appellant,

versus

George Hammerly, t/a Garrett Insurance Agency,
a/k/a George P. Hammerly Associates,

Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Decided January 19, 1972.)

Before Haynsworth, Chief Judge, and Sobeloff and Boreman, Senior Circuit Judges.

(Daniel G. Grove, and Amram, Hahn, Sandlun and Sandground, and Edward Whitaker, on brief) for Appellant in Nos. 71-1270 and 71-1271; and (Adelard L. Brault and Brault, Lewis and Geschickter, on brief) for Appellee Retail Credit Company in No. 71-1270; (E. Waller Dudley and Boothe, Dudley, Koontz, Blankingship and Stump, on brief) for Appellee George Hammerly in No. 71-1271.

Per Curiam:

In 1967 Miss Pogue, of Miami, Florida, read an advertisement placed by the Walker & Townsend Co. of New York. The advertisement stated that Walker & Townsend would make loans, with securities as collateral, up to ninety per cent of the value of the securities. By comparison, bank loans to finance stock purchases were then retricted to twenty per cent of the value of the securities due to margin requirements. Miss Pogue, an experienced businesswoman who had dealt extensively in the stock market, regarded this offer as an opportunity to pyramid her stock holdings. By borrowing against stock she then held, she could buy more stock, which would in turn be used as collateral for another loan to buy still more stock.

After reading the ad, Miss Pogue traveled to New York to meet representatives of Walker & Townsend. At that time she signed two notes for a total of $33,000 and a blank power of attorney so that Walker & Townsend could obtain her securities from her broker, Walston & Co.

After signing and delivering the notes and the power of attorney, Miss Pogue called appellee, George Hammerly, in Leesburg, Virginia. Hammerly, apparently a friend of

Miss Pogue, was in the insurance business. Occasionally, he would rely on Miss Pogue's advice regarding the stock market. Also, Pogue and Hammerly were co-signers of a note. When Miss Pogue telephoned, she told Hammerly of her transaction with Walker & Townsend and asked him to get for her a Dun & Bradstreet report on Walker & Townsend. Instead, Hammerly sent her a report published by Retail Credit, Inc., the other appellee. He sent the Retail Credit report rather than one published by Dun & Bradstreet, as requested, because he was a subscriber to Retail Credit and not to Dun & Bradstreet. When Miss Pogue received the report, she expressed some chagrin. Hammerly reassured her by saying that Retail Credit had a department for commercial credit as well as one for individual credit, and so it was just as good as Dun & Bradstreet.

This initial report contained no information because Retail Credit had never investigated Walker & Townsend. Hammerly offered to get a complete report but explained that it might be expensive. At Miss Pogue's request, he sought the complete report. This second report also contained little information, explaining that the principals of the company refused to divulge their identity and that Retail Credit could confirm no financial information about Walker & Townsend.

Some months later, Miss Pogue became suspicious of Walker & Townsend because they failed to forward her dividend checks. Discovering that she could obtain a Dun & Bradstreet report through her bank, she did so. The Dun & Bradstreet report disclosed the fact that principals of Walker & Townsend were under a federal indictment. Miss Pogue tried to pay off her loan in order to have her

securities returned. But Walker & Townsend had closed their offices and absconded with Miss Pogue's securities.

Miss Pogue related this scenario at the trial. She tried to rely on a breach of contract theory in order to avoid the Virginia statute of limitation. Apparently, that statute requires an action based on deceit where defendant was indirectly responsible for plaintiff's loss to be brought within one year. *Travelers Ins. Co. v. Turner*, 211 Va. 552, 178 S.E.2d 503, *Carva Food Corp v. Dawley*, 202 Va. 543, 118 S.E.2d 664; *Cover v. Critcher*, 143 Va. 357, 130 S.E. 238. The trial judge reserved decision on the statute of limitation and its application to these cases, and we may do so too. Judge Lewis directed a verdict for defendant, Retail Credit, and allowed the case against defendant, Hammerly, to go to the jury. The jury brought in a verdict for the defendant.

Appellant contends that Judge Lewis committed error in directing the verdict for Retail Credit and in failing to instruct the jury in the case against Hammerly on a theory based on deceit as well as on contract.

Appellant contends that the testimony did disclose evidence of negligence against Retail Credit and that the trial court should have allowed the jury to evaluate this evidence. The test on directing a verdict, however, is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice (2d ed. 1971) § 50.02[1]; *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80; *Pinehurst, Inc. v. Schlamowitz*, 4 Cir., 351 F.2d 509, 513.

Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am.Jur. 2d *Fraud and Deceit*, § 223 (1968). Miss Pogue testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even though she had committed herself.

Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contained no information on which an experienced businesswoman might reasonably rely. Moreover, Retail Credit carefully pointed out that Walker & Townsend assiduously avoided divulging information about itself, even the identity of its principals, a fact that would seem to alert any reasonably experienced person in the business world. Officials of a legitimate business might withhold detailed financial information, but hardly their own identity. The report was one of warning, not of assurance.

Similarly, Miss Pogue produced no evidence on which a reasonable jury could base a determination that she relied on Hammerly in this transaction. In addition, under Rule 51 of the Federal Rules of Civil Procedure, a party may not object to instructions given or not given to the jury unless the party objects before the jury retires. Since the appellant failed to object as required and also failed to submit instructions based on deceit, she cannot now

complain. Even if the appellant feared that such instructions would have been barred due to the trial court's evaluation of the statute of limitations these instructions should have been submitted. Our decision that the trial court committed no error here, however, is based more on the lack of evidence of deceit than it is on the failure to request instructions on deceit.

Since a careful evaluation of the record below and of the briefs submitted on appeal raises no substantial legal question, we dispense with oral argument. For the reason stated above, the decision of the district court is summarily affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1270

Marti Pogue,

Appellant,

versus

Retail Credit Company,

Appellee.

No. 71-1271

Marti Pogue,

Appellant,

versus

George Hammerly, t/a Garrett Insurance Agency, a/k/a George P. Hammerly Associates,

Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Filed March 6, 1972)

ORDER

Upon careful consideration of the petition to rehear, and with the concurrences of Judge Sobeloff and Judge Boreman, the petition is denied.

FOR THE COURT:

Clement F. Haynsworth, Jr.

Chief Judge, Fourth Circuit

App. 12

EXHIBIT 2

C/a 247-248-69-A

GARRETT INSURANCE AGENCY
P.O. BOX 691
LEESBURG, VIRGINIA 22075

SP 7-1333

August 1, 1967

Miss Marti M. Pogue
245 N. E. 47th Street
Miami, Florida

Dear Marti:

I have ordered the other credit reports and I attach a photostat of a letter on Walker and Townsend. I have asked Retail Credit to make a complete report. As soon as I get them, you will hear from me.

With my kindest regards, I am

Very truly yours,

/s/ George P. Hammerly

George P. Hammerly

/rk
Enc.

App. 13

RETAIL CREDIT COMPANY
Insurance, Credit and Personnel Selection Reports
Home Office, Atlanta, Georgia

July 25, 1967

George P. Hammerly Associates
Leesburg, Virginia

RE: Walker and Townsend
80 Wall Street
New York City

Dear Mr. Hammerly:

In response to your telephone request that we supply you with a copy of reports submitted on Walker and Townsend of the above listed address, we have made a thorough search of our past reports and find that we have not reported on this subject in the New York City area. We further checked with our subsidiary company, Retailers' Commercial Agency of Jamaica, New York, and they too, have never had the the occasion to submit any reports on Walker and Townsend.

Should you desire an up-to-date investigation on this firm; we will be more than happy to comply. If we may assist you further concerning this matter, please contact this office.

Yours truly

Assistant Manager

JFM:bh

EXHIBIT 3

C/a 247-248-69-A

GARRETT INSURANCE AGENCY
P.O. BOX 691
LEESBURG, VIRGINIA

August 14, 1967

Miss Marti M. Pogue
245 N. E. 47th Street
Miami, Florida

Dear Marti:

Attached please find a Retail Credit Report on Walker and Townsend. You are not supposed to have this with my account number on it; hence, you will note I have cut it off.

In any event, it is not very informative, but it is the best I know how to do. It does not look like they are fronting for any crooked outfit, so it looks like you are in good shape. In any event, I hope so.

With kindest regards, I am

Very truly yours,

/s/ George P. Hammerly

George P. Hammerly

/rk
Enc.

RETAIL CREDIT COMPANY
REPORT

Due to the nature of our findings, we are submitting this report in memorandum form.

Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. They have been here for the past six years. This firm is a European finance company specializing in colatoral loans. They are not a fund for any union. Principles of this firm can not be identifies as the firm does not reveal this information. The principles have their identity hidden. Two people will run the firm as representatives in New York City, a Mr. Harrison and a Mr. Lundy. These people, we were told are constantly on the road traveling and very rarely in their office. This firm also has a bookkeeping department located somewhere in Philidelphia. We noted the door to the office had a cable address written Bienvenido, New York.

A source contacted at this business address stated in his opinion this is a multi-million dollar outfit. Please note that this could not be confirmed.

JS 044/sn

EXHIBIT 7

C/a 247-248-69-B

WALKER & TOWNSEND
70 PINE ST (RM 4710)
FMLY: 80 WALL ST.
NEW YORK N. Y. 10005
TEL. 212 422-4940

R. HARRISON, PRES.
HUBERT A. LOPEZ, SEC. & TREAS.
ELSIE CAVICCHIA, AUTHORIZED SIGNER
DIRECTORS: The Officers

PAYMENTS

Nature of business would appear to be of a service type. However, the company is known to have placed advertisements in out-of-town newspapers and, at least in three instances the newspapers have not received payment. One creditor has a bill of $325 long past due. Two others have invoices of over $100 and $266 respectively, that have been placed for collection.

FINANCE

On June 23 1967, at 70 Pine Street, a man who declined to give his identity, was interviewed and detailed financial information declined. Outside sources had no additional information as to subject's financial responsibility. It should be noted that there are slow and past due amounts owing by the company.

BANKING

An out-of-town bank, has an account since May 1967. Balances average from moderate to medium four figures. No requests for loans.

HISTORY

Incorporated New York Aug. 12 1965. The authorization is 200,000 shares of common stock, no par value.

Investigation in outside quarters developed the names of the officers.

R. HARRISON, antecedents not developed.

H. A. LOPEZ, antecedents not developed, but is located at 70 Pine Street and is known to have acted on behalf of the corporation.

ELSIE CAVICCHIA has authorization to sign on behalf of the company. Is reportedly a resident of Newark, N.J. At least in one instance, Elsie Cavicchia acted in behalf of the company by making part payment of a loan, to a client of subject, by means of a personal check. Antecedents currently being investigated.

Subject was previously located at 80 Wall Street which was the business address of Columbia Resources Ltd., in which business, John De Lyra, was associated and had authorization to sign in behalf of the corporation. Present business address is the same location as was used by Christopher Campbell Inc., in which John De Lyra was associated.

In outside quarters consulted it was learned that John De Lyra has acted on behalf of the subject corporation. He has also been seen on the premises.

DE LYRA, marital status not known, born 1920. He is reported to have been active in the real estate management field his entire career. De Lyra is reported to have been an officer, stockholder or active manager in the following corporations, all of which functioned in the real estate management line and all of which maintained their headquarters at 80 Wall Street Franklin Atlas Corp., chartered New York laws Dec. 30 1954; Allstate Securities Inc., chartered New York laws July 11 1957; International Building Management Corp., chartered New York laws Sept. 17 1957; Wall St. Commercial Corp., chartered New York laws June 30 1960. De Lyra is currently Vice President and Treasurer of Water Street Management Corp., formed New York laws Nov. 6 1961. Corporation functions as a real estate management company.

Records of the Southern District of New York (63 CR 843) show that John L. De Lyra was indicted on Oct. 10 1963 on three counts charged with unlawfully making false and fraudulent statements and representations to the Securities & Exchange Commission (Counts 1 & 2), and conspiracy so to do (Count 3). Defendent pleaded "Not Guilty". Bail was set at $5,000. On Mar. 23, 1966, a motion was made to have bail extended (see below) to cover 64 CR 1012. Motion was granted on Apr. 4 1966. Case pending as of July 18 1967.

Records of the Southern District of New York (64 CR 1012) show that on Nov. 23 1964 John L. De Lyra

and another and Allstate Securities Inc.' were indicted for causing shares of stock not registered with the Securities & Exchange Commission to be carried through the mails and Interstate Commerce (Counts 2 & 3) employing schemes to defraud in the offer and sale of stock by use of transportation and communication so to do (Count 1). A plea of "Not Guilty" was entered for Allstate Securities Inc., on Dec. 31 1964. On Dec. 23 1964, the court directed a plea of "Not Guilty" entered on behalf of John De Lyra. Dec. 30 1964 De Lyra filed notice of appearance. July 28 1965 filed $5,000 bail bond. As of July 18 1967 case still pending.

John De Lyra and five others were named in a 30 count indictment handed down by a Federal Grand Jury on Jan. 23, 1967, charging them with collecting more than $250,000 in advance payments from mortgage applicants through wire and mail fraud. Docket # 67 CR 56. John De Lyra pleaded "Not Guilty". Bail set at $5,000; raised to $25,000. Cast still pending as of July 17 1967. This was in connection with the charge that the defendants unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud, and obtain money and property by means of false and fraudulent pretenses, representations and promises.

Columbia Resources Ltd., chartered New York laws Nov. 4, 1964, authorized capital 200 shares no par value common stock, was formerly located at 80 Wall Street, New York, N.Y. Engaged in finance. The latter indictment relates to activities of that corporation.

Christopher Campbell Corp., chartered New York laws June 24, 1964, authorized capital 30,000,000 shares com-

mon stock $.01 par value, also engaged in finance. Present activities, if any, not learned.

OPERATION

Detailed information as to method of operation has not been provided by management. According to newspaper advertisements, company is engaged in finance. Advertise that loans are given to 90% of market value on marketable securities. LOCATION: Rent office in Room 4710 at 70 Pine Street, a modern skyscraper type of structure. 7-19 (486-549 68) T2

App. 21

SN 1 AUG 24 1967 N

FINANCE

1965 NQ

WALKER & TOWNSEND INC.
70 PINE ST
NEW YORK NY 10005
TEL 212 422-9940

Records show that Theodore Kampinski, resident of 301 East 23rd St., N.Y., N.Y. was arrested by the Federal Bureau of Investigation.

He was arraigned in the Southern District Court of N. Y., N.Y. on July 14, 1967. Bail was set at $1,000 on July 17, 1967. A hearing was set for August 17, 1967 and adjourned to September 21, 1967.

It was alleged that from January 1, 1967 to July 14, 1967 he did unlawfully, knowingly and willingly devise a scheme to defraud and obtain money and property by means of false pretenses. Part of the scheme was that Kampinski would hold himself out and represent himself to be Teddy Kayhill, an official of Walker & Townsend Inc. at 80 Wall St.

It was alleged that the defendant would receive from two individuals securities valued at $360,000 and thereafter convert to his own use.

Matter pending as of August 24, 1967.
8-24 (486 16)

SN 1 SEPT 26 1967 N

FINANCE

1965

[Filed Oct. 16, 1967]

WALKER & TOWNSEND INC.
70 PINE ST (RM 4710)
FMLY: 80 WALL ST
NEW YORK N Y 10005
TEL 212 422-4940

PUBLIC RECORD INFORMATION

ITEM: Suit — Goods sold and delivered

AMOUNT: $266

DATE FILED: Sept. 12, 1967

DEFENDANT: (Against) Walker & Townsend Inc.

PLAINTIFF: (Instituted by) Eagle Tribune

FURTHER DETAILS:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

C.A. 247-69-A

MARTI PAGUE
245 N.E. 47th Street
Miami, Florida

Plaintiff,

vs.

RETAIL CREDIT CO.,
A Georgia Corporation
Serve: C. Thomas Taylor, 700 E. Main Street
Richmond, Va. 23219
Registered Agent

Defendant.

COMPLAINT

COMES NOW, the Plaintiff, by counsel, and asks judgment against the Defendant, Retail Credit Co., in the amount of $125,000 compensatory damages. In addition, Plaintiff demands $125,000 punitive damages, and states the following:

I

The jurisdiction of this court over this cause is founded upon the diversity of citizenship between Plaintiff and Defendant and the amount sued for exceeds $10,000 exclusive of interest, court costs or attorney's fees. The Plaintiff is a resident of the State of Florida. The Defendant is a Georgia Corporation doing business in Virginia.

Count One

(Breach of Contract)

1. On, or about July 25, 1967, Plaintiff's agent, George Hammerly, contracted with defendant Retail Credit Co., that he would purchase and they would sell, one character and financial report on the Walker and Townsend Co., of 80 Wall St., New York, N.Y., based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and the consideration therefore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation.

By reason of the breach of contract, Plaintiff was damaged in the amount of $125,000.

Count II

(Constructive Fraud)

1. Plaintiff adopts Paragraphs 1 and 2 of Count 1.

2. Defendant is a mercantile agency in the regular business of furnishing financial reports upon the request of their subscribers. As such, it has a duty to exercise care and diligence in their preparation.

3. Notwithstanding said duty, defendant failed to exercise care and diligence, and furnished a report prepared with such gross negligence and with such bad faith as to amount to constructive fraud.

By reason of such gross negligence and constructive fraud, Plaintiff was damaged in the amount of $125,000 and $125,000 punitive damages.

/s/ Marti Pogue

Marti Pogue
by counsel

s/

Lucy Logan
Counsel for Plaintiff

/s/ Edward S. Whitaker

Edward S. Whitaker
Counsel for Plaintiff
1400 N. Uhle Street
Arlington, Virginia